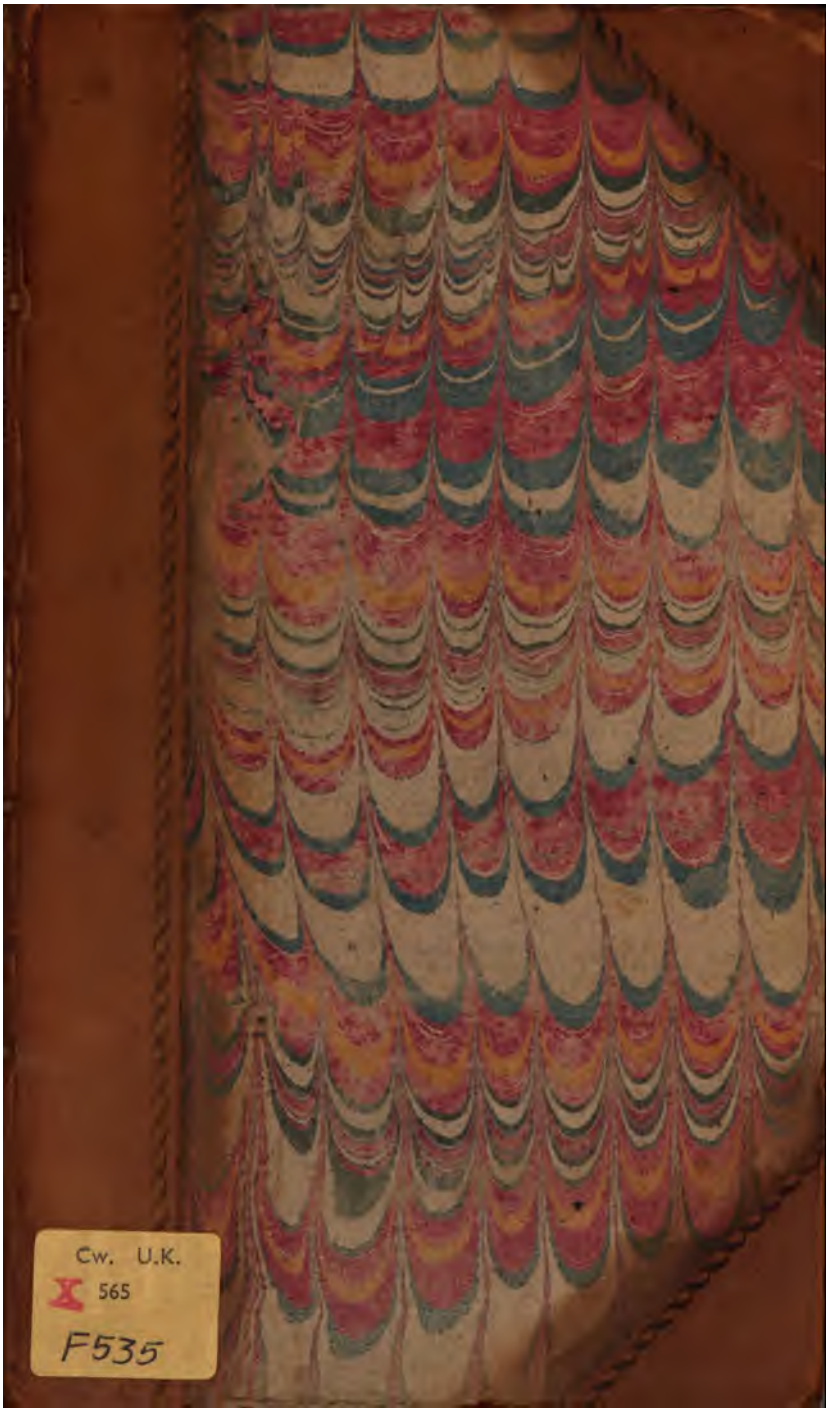

AN ACT

FOR THE AMENDMENT

OF THE

Law with respect to Wills,

(1 Vict. c. 26.)

WITH REMARKS

EXPLANATORY OF THE SEVERAL CLAUSES,

THE OBJECT OF THEIR ENACTMENT,

AND THE ALTERATION IN THE LAWS THEREBY EFFECTED;

WITH

AN INDEX TO THE ACT.

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

It has been the object of the Editor of the following pages to explain, in the most convenient form, and as shortly as possible, the alterations effected in the law by the Act respecting Wills which has just passed the Legislature. For this purpose it was necessary to explain something of the law as it had been previously established by statutory enactment and judicial decisions: but in doing this he has endeavoured to confine himself strictly to such part only as is affected by the provisions of the new Act; the order of which he has followed, for the convenience of comparison. This must be his excuse for the incomplete and desultory character of his observations. No apology seems necessary for any attempt to elucidate a statute of such great and general importance.

2, *Stone Buildings,*
Lincoln's Inn.

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THE REVOCATION, ALTERATION, AND REVIVAL OF WILLS.

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1 Vict. c. 26.

An Act for the Amendment of the Laws with respect to Wills. [*3d July*, 1837.]

Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite, and by

Meaning of certain words in this act:

"Will:"

12 Car. 2, c. 24.

Knights Service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles
14 & 15 Car. 2, (I.) the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition;
"Real estate:" and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel
"Personal estate:" interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every
Number: word importing the singular number only, shall extend and be applied to several persons or things as well as one person or thing; and
Gender. every word importing the masculine gender only, shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the parliament of Ireland, in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing, concerning any goods or chattels or personal estate, or any clause, devise, or bequest there-

Repeal of the statutes of Wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1. Sess. 2, c. 2, (I.)

Sec. 5, 6, 12, 19, 20, 21, & 22, of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.)

Sect. 14, of 4 & 5 Anne, c. 16.

6 Anne, c. 10. (I.)

Sec. 9, of 14 G. 2, c. 20.

25 G. 2, c. 6, (except as to colonies.)

25 G. 2, c. 11, (I.)

in; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the parliament of Ireland in the sixth year of Queen Anne, intituled "An Act, for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie;* and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America, except so far as relates to His Majesty's Colonies and Plantations in America;" and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts

and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts, or any of them respectively, relate to any wills or estates *pur autre vie*, to which this act does not extend. 55 G. 3, c. 192.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom

All property may be disposed of by will, comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become

Estates *pur autre vie;*

contingent interests;

rights of entry; and property acquired after excution of the will.

entitled to the same subsequently to the execution of his will.

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully

due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor;

and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c. when such estates are not now divisable as he would have been from the heir in case of descent.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it

Estates *pur autre vie.*

shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

No will of a person under age valid;

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

nor of a feme covert, except such as might now be made.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act. Soldiers and mariners' wills excepted.

XII. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth, and the first year of the reign of his late majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, Act not to affect certain provisions of 11 G. 4, and 1 W. 4, c. 20, with respect to wills of petty officers and seamen and marines.

prize money, bounty money, and allowances, or other monies payable in respect of services in her majesty's navy.

Publication not to be requisite.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness

to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions).

No will to be revoked by presumption.

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codocil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

No alteration in a will shall have any effect unless executed as a will.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum

referring to such alteration, and written at the end or some other part of the will.

No will revoked to be revived otherwise than by re-execution of a codicil to revive it.

XXII. And be it further enacted, that no will or codocil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same; and when any will or codocil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A will shall be construed to speak from the death of the testator.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it

had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A residuary devise shall include estates comprised in lapsed and void devises.

XXV. And be it further enacted, that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A devise without any words of limitation shall be construed to pass the fee.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

No devise to trustees or executors, except for a term or a presentation to a church shall pass a chattel interest.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest, which the testator had power to dispose of by will in such real

estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estates Tail shall not lapse.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the

testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January one thousand eight hundred and thirty-eight.

XXXV. And be it further enacted, that this act shall not extend to Scotland. Act not to extend to Scotland.

XXXVI. And be it enacted, that this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present Session of Parliament. Act may be altered this session.

CHAPTER I.

THE HISTORY OF THE ACT.

THE subject of Wills has of late years been very much considered and carefully investigated by two distinct Commissions—by the Real Property Commission, which was appointed in 1828, and by the Ecclesiastical Commission, which was appointed in 1830. It was part of the business of the Real Property Commission to consider the law relating to wills of real estate; and part of the business of the Ecclesiastical Commission to consider the law relating to wills of personal estate.

Lord Langdale's Speech in the House of Lords, Feb. 23, 1837.

The Report of the Ecclesiastical Commission was made in February, 1832. The Fourth Report of the Real Property Commission, which is upon the subject of wills, was made in April, 1833. With a view principally to carry into effect the recommendations of the Real Property Commission, a Bill was prepared and brought into the House of Commons in 1834, which was referred to and considered in a Select Committee, but did not then proceed further.

In the year 1835 it was again introduced into the House of Commons, and passed the house after having been again referred to and very care-

fully considered in a Select Committee. It was then taken up to the House of Lords, read once, and referred to a Select Committee, from which it received great attention; but no report was made.

In the year 1836 the same Bill was presented to the House of Lords by Lord Langdale; but it was not proceeded with in the course of that Session of Parliament. In the meanwhile copies of the bill were distributed among the profession, and every opportunity afforded for the improvement and perfection of a scheme of such general importance.

In the present year it was again introduced into the House of Lords by the same learned lord; and was after considerable discussion carried through both Houses of Parliament, and received the royal assent.

The general effect of the Act is the consolidation of the provisions of former statutes relating to wills, and at the same time such modifications have been made in these provisions as will afford additional securities for the prevention of spurious wills, and additional facilities for the making of genuine wills.

The particular provisions relate to,

1st. The property which may be disposed of by will, (ss. 3 to 6).

2d. The persons by whom wills may be made, (ss. 7 and 8).

3d. The mode of their execution, (ss. 9 to 17).

4th. Their revocation, alteration, and revival, (ss. 18 to 23).

5th. Particular rules for their construction, (ss. 24 to 33).

We will proceed to the consideration of each section separately, beginning with the third; the first containing only an exposition of terms to be used, and the second a repeal of former statutes upon the subject.

CHAPTER II.

THE PROPERTY WHICH MAY BE DISPOSED OF BY WILL.

THE testamentary power over real as well as over personal property has grown up in England from a remote origin, and has been for a long time exerciseable, either directly or indirectly, over every kind of possession, which, not being fettered by entails or liabilities, could be transferred by alienation taking effect in the owner's lifetime. It will be well to take a short survey of the history of this power; first, as it has been established over *land*, and secondly, as in accordance with common reason it has been assumed and exercised over *personalty*.

History of Testamentary Power over Real Property, Hargrave's Note to Co. Litt. 111. b.

The testamentary power over land was certainly in use among our Anglo-Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs which they found here, than brought from their own country: for Tacitus says, writing of the ancient Germans, *successores sui cuique liberi, et nullum testamentum*, Spelm. Posthum. 21, 127. After the Norman conquest the power of devising land ceased, except as to socage lands in some particular places, such as cities and bo-

roughs, in which it was still preserved; and also except as to terms for years or chattel interests in lands, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions; but principally from the general restraint of alienation incident to the rigours of the feudal system, as it was established or at least perfected by the first William. See Wright's Ten. 172. In the reign of Edward the First, the statute of *quia emptores* removed in a great measure this latter bar to the exercise of testamentary power; that is, in respect to all freeholders, except the king's tenants in capite. But the two former obstructions still continued to operate; though, indeed, this was in name and appearance only; for soon after the statute of *quia emptores*, feoffments to uses came into fashion, and last wills were enforced in Chancery as good declarations of the use; and thus through the medium of uses the power of devising was continually exercised in effect and reality. But at length this practice was checked, not accidentally, but designedly, by the statute of 27th of Hen. 8, which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated

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Real Property. them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction to make its operation dependent on the intention of parties, were invented. However, the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interposed to restrain an indirect mode of passing land by last wills, expressly made it devisable. This great change of the common law was effected by the statutes of 32 & 34 Hen. 8, which, taken together, gave the power of devising to all having estates in fee-simple, except in joint-tenancy over the whole of their socage land, and over two-thirds of their land holden by knight's service. The operation of these acts was further extended by the conversion of knight's service into socage in the 12 Cha. 2. But still copyhold lands, and also estates *pur autre vie* in freehold lands, remained undevisable, unless it were by the artifice of vesting the legal estate in trustees, in like manner as estates in fee-simple might be devised before the Statute of Uses. On the one hand, they were not devisable at common law; because they came within the description of real estate. On the other hand, they, or at least the former, are not within the statutes of Hen. 8, these requiring that the tenure should be socage, which a copyhold is not; and that the party should have an estate in fee-simple, which is more than a tenant

Rep. of Real Prop. Comm. 1833, p. 9.

pur autre vie can be said to have. This defect of provision in the statutes of wills was supplied as to the estates *pur autre vie* by the 29 Cha. 2, c. 3, which made them devisable in the same manner as estates in fee-simple. And with respect to copyhold estates, over which a power of devising was long exercised indirectly by an application of the statute of uses, similar to that which was anciently resorted to for passing freehold lands, the practice being to surrender to the use of the owner's last will, on which surrender the will operated as a declaration of the use, and not as a devise of the land, a recent statute rendered valid the direct disposition of them by will in all cases in which the same could before have been effected indirectly by the means of such previous surrender; though this statute was held only to supply the want of a mere *formal* surrender, and not of such surrender as are matters of substance by the custom of the manor.

Real Property.

Semaine *v.* Selwin, 1 Bulst. 200; Attorney-General *v.* Vigor, 8 Ves. 286.

55 Geo. 3, c. 192.

Doe *v.* Bartle, 5 B. & A. 492.

With respect to personal estate the power of bequeathing, says Sir William Blackstone, is coeval with the first rudiments of the law; for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy in the old law before the Conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. But we are not to imagine that the power of bequeathing extended originally to *all* a man's per-

Personal Property. Comm. bk. ii. ch. 32.

Personal Property.

sonal estate. On the contrary Glanvil, that by the common law as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *è converso*, if he had no children the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their *reasonable parts;* and the writ *de rationabili parte bonorum* was given to recover them.

This continued to be the law of the land at the time of *Magna Charta*, which provides that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and if nothing shall be owing to the crown, *omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis.* In the reign of king Edward the Third, this right of the wife and children was still held to be the universal or common law; though frequently pleaded as the local custom of Berks, Devon, and other counties: and Sir Henry Finch lays it down expressly, in the reign of Charles the First, to be the general law of the land. But this law

became altered by imperceptible degrees, and the deceased might bequeath by will the whole of his goods and chattels; though we cannot trace out when first this alteration began. The ancient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times; when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes were provided, the one 4 & 5 W. & M. c. 2, explained by 2 & 3 Ann. c. 5, for the province of York; another, 7 & 8 W. 3, c. 38, for Wales; and a third, 11 Geo. 1, c. 18, for London; whereby it is enacted, that persons within those districts and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus was the old common law utterly abolished throughout all the kingdom of England, and a man might devise the whole of his chattels as freely as he formerly could his third part or moiety. *Personal Property.*

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This section consolidates all the former statutes by which property has been rendered disposable by will, and enacts generally, "that it shall be lawful for every person to devise, bequeath, or dispose of by will all real estate and all personal estate, which he shall be entitled to, either at law *Testamentary Power under 1 Vict. c. 26.*

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or in equity, at the time of his death, and which if not devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator." It then goes on to obviate several uncertainties which arose upon the statutes of wills, and were remedied by subsequent statutes, as well as to supply what seem to be defects in all the former enactments, by declaring that this power shall extend to customary freeholds and copyholds, without surrender, and before admittance, and notwithstanding special customs to the contrary; to estates *pur autre vie;* to contingent, executory, and other future interests; to rights of entry; and lastly, to property acquired after the execution of the will.

Copyholds and Customary Freeholds.

To examine separately the alterations which are effected by this clause. Copyholds, as it was stated above, were indirectly subjected to testamentary disposition by means of a surrender to the use of a will, by which the use was declared. This power, says Mr. Evans, was originally dependent wholly upon special custom, but in Pike *v.* White, 3 Bro. Ch. C. 286, it being alleged that, according to the custom of a manor, copyhold lands holden thereof could not be surrendered to the use of a will, and were not devisable by virtue of any custom of such manor, Lord *Thurlow*, C., said, it was totally impossible to say that a copyhold surrendered to the use of a will

See Evans' Statutes, notes to 32 H. 8, c. 1.

should not pass thereby, and therefore he must declare the custom (if there were such a one) bad. See Church *v.* Mundy, 15 Ves. 396. Thus it seemed to be decided that by the general custom of all manors, every copyholder had a right to surrender his estate to the use of his will; though doubts have been entertained as to Lord Thurlow's general proposition as reported by Mr. Brown in the case of Pike *v.* White; and particular customs were held paramount notwithstanding. But many hardships and inconveniences arose even where there was a custom of surrendering to the use of a will; owing to the frequent neglect of making such surrender, by which alone the estate could pass agreeably to the intentions expressed in the will. In some cases the Court of Chancery supplied a surrender: and the 55 Geo. 3, c. 192 (*a*), was framed, by which surrenders to the use of wills, where surrenders are within the custom of a manor, are dispensed with. But there are manors in which no such custom can be traced upon the records, and there are customary estates not within 55 Geo. 3, c. 192, and not susceptible of devise otherwise than by the medium of deeds of trust; and which, in some

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Cru. Dig. Tit. 38, c. 4, s. 2.

Doe *v.* Bartle, 5 B. & A. 492.

Evans' Statutes, tit. Wills, note.

(*a*) Mr. Evans, who prepared this bill, says of it: "According to the draft which I submitted, the provision would have been general, as embracing all copyholds and customary estates, with respect to such interests as a testator could by any mode of conveyance have disposed of." (Coll. of Stat. note.)

SECT. 3. instances, must be renewed annually, or after certain periodical intervals, so that if the time of renewing them is suffered to elapse, or the testator falls into a state of incapacity, the devise becomes inoperative. And it is probable that other anomalous customs exist in some manors, by force of which the legal estate in the copyholds could not, before this act was passed, be devised. And cases not unfrequently occurred in which a person entitled to the full enjoyment of copyhold estates, had neglected to be admitted to them, or was prevented by accident; and, therefore, was not in a position (*a*) to surrender them to the use of his will, though in reason he ought to have had the power of devising them. It seems to be the intention of the legislature to make property of this nature directly devisable in *all* cases; for which purpose it is declared that the general power of devising given by this section, "shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law

Doe *v.* Tofield, 11 East, 246.

(*a*) It was decided in Right *v.* Banks, 3 Barn. & Adol. 664, that an heir could devise before admission.

have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made."

Estates pur autre Vie.

The law with respect to the passing of estates *pur autre vie*, upon the death of the tenant, living the *cestui que vie*, has hitherto been involved in much difficulty. If no person were named in the grant to take the estate in that event, it did not descend to the heir, because it was not inheritable; and the executors and administrators were not entitled to it, because it was a freehold. It was therefore without any legal owner; and in the case of a freehold corporeal hereditament, the first person who entered and took possession, was allowed by the law to retain it for his own benefit. He was called the occupant. In the case of a copyhold hereditament, the lord became entitled to it, because as owner of the freehold, he was considered to be in possession, and therefore no other person could gain a title by occupancy. In the case of a rent or other incorporeal hereditament, the estate determined on the death of the owner; because there could be no entry, and therefore no title by occupancy.

Bl. Comm. book ii., ch. 16. Report of Real Property Commissioners, 1833, p. 9.

The statute 34 & 35 Hen. 8, only extending to estates in fee simple, did nothing towards re-

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medying this inconvenience attending estates *pur autre vie.* But the 29 Car. 2, c. 3, made these estates directly devisable, and also provided that if there should be no devise of an estate *pur autre vie,* it should be chargeable in the hands of the heir, if it should come to him by reason of special occupancy, as assets by descent; and in case there should be no special occupant, it should go to the executors or administrators, and be assets in their hands. This clause in the statute is considered to have been passed to put an end to general occupancy. But it was doubted whether it was intended to continue estates which, when there was no special occupant, determined, because they were not liable to general occupancy. The statute does not mention copyholds, or incorporeal hereditaments; it does not refer to executors or administrators as special occupants; and it makes no provision for the surplus remaining after payment of debts. And upon the construction of the statute, it is held not to extend to copyholds, because it could not be intended to prejudice the right of the lord; on the contrary, with respect to rents and other incorporeal hereditaments, it has been determined, that where there is no special occupant, or *quasi* occupant, the estate is continued during the lives for which it was granted, and may be devised; and, if not devised, goes to the executors or administrators. Though it did not provide for the distribution of the surplus as personal estate; and there-

Report of Real Property Commissioners, 1833, p. 10.

Zouche *v.* Forse, 7 East, 186.

Bearpark *v.* Hutchinson, 7 Bing. 178.

fore the 14 Geo. 2, c. 29, was passed. For a more full elucidation of this subject, the reader is referred to the 4th Report of the Real Property Commissioners, 1833. It is believed that what has been here stated is sufficient to explain the object of the words of this clause, viz. that the testamentary power thereby given shall extend "to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof; and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament."

Contingent, executory, and future Interests.

Fearne's Cont. Rem. 8th ed. p. 366, et seq.

An opinion formerly prevailed, that neither contingent remainders, nor any other contingent estates or interests in land could pass by a will made previous to their vesting: but modern decisions have established the power of testamentary disposition of contingent and executory estates and possibilities accompanied with an interest; and of such as would be descendible to the heir of the object of them dying before the contingency or event, on which the vesting or acquisition of the estate depended. [Selwyn *v.* Selwyn, 2 Burr. 1131; 1 Black. Rep. 222, 251; Moor *v.* Hawkins, 2 Eden, 342; 1 H. Black, R. 33; Roe d. Perry *v.* Jones, 1 H. Black. R. 30; Perry *v.* Phelips, 1 Ves. J. 251.] But these decisions do not appear to reach those cases, where neither the contingent interest itself is transmissible from any person until the contingency

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decides him to be an object of the limitation, nor the person or persons to or amongst whom the contingent or future interest is directed, is or are in any degree ascertainable before the contingency happens. As if an estate be limited to two sisters and the survivor of them, and, after the death of the survivor, to such other person as the survivor may give it by will: whilst the two sisters are both living it cannot be known which will survive; and a will made by one of them, in the expectation of surviving, would fail, though she should afterwards actually survive, and be competent to dispose of the property. This the legislature has now remedied by the clause under our consideration.

Lord Langdale's speech in the House of Lords, Feb. 23, 1837.

Rights of Entry.

It has been formally decided that a right of entry is not devisable. As where a tenant for life levied a fine, by which the estate of the remainder-man was devested, and turned into a mere right. Lord *Ellenborough*, C. J., said, "such right of entry is not devisable. For such right is certainly not assignable by the common law; nor does it fall within the words of 32 Hen. 8, c. 1, which are "*having* manors, lands, tenements, or *hereditaments*;" nor of the statute 34 & 35 Hen. 8, c. 5, s. 4, which are "*having* a sole estate or interest in fee simple of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder." If the devise of the testator were stated upon record in any pleadings at common law, what

Goodright *v.* Forrester, 8 East, 566.

description of *interest*, falling within these words, could he be stated to have had at the time of the devise? The opinion of Lord *Eldon*, in The Attorney-General *v.* Vigor, 8 Ves. 282, was certainly against it; and the case of Roe *v.* Griffiths, 1 Black. Rep. 606; Goodtitle *v.* Wood, Willes, 211; and Roe *v.* Jones, 3 T. R. 94, do not show that such a right of entry is devisable; as in those cases the devisors devised all the interest they had ever had. And Lord *Thurlow*, 1 Ves. Jun. 255, supposed, in order to bring executory interests within the statutes of wills, that they must have been considered as *executed* by the statute of uses; which is a very different interest from a right of entry for the purpose of re-vesting a devested estate. In *Corbet's*, case, 1 Co. 85 *b*. "For the construction of wills this rule was taken by the justices in their arguments; that such an estate, which cannot by the rules of the common law be conveyed by act executed in his life, by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended by the law to be *inops consilii*:" from whence it may be inferred that out of that interest, in which, by act executed in a man's life, it is not possible to create any estate, no estate can be created by his will. And in *Butler* and *Baker's* case, 3 Co. 32 *a*, it is said, "Without question, that which a man cannot dispose of by any act in his life shall not be taken for any of his manors, &c., whereof he may de- SECT. 3.

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vise two parts by authority given him by the statute." And in Lord *Mountjoy's* case, Godbolt, 17, it is laid down "that the statute of wills, 32 Hen. 8, that it shall be lawful, &c. to devise two parts, &c. respects only such things as are devisable: but a right of entry, according to the terms of the statute and the authority of that case, is not devisable. For these reasons, we are of opinion that there must be judgment for the defendant. And whatever mischief or hardship may attend the decision of this case, or may be expected to arise from the application of the same rule to other cases, it is an inconvenience which can, if our judgment be well founded, only be remedied by positive law. And the propriety of applying such a remedy, whereby the same rights of entry and action which belong to the heir may be extended to the devisee, is a question particularly fit for the consideration of the legislature." This remedy is now applied by this Act.

After-acquired Property.

See Lord Langdale's Speech in House of Lords, Feb. 23, 1837. Cowp. 90, 305, 11 Mod. 121; Bunker v. Cook, 3 Bro. P. C. 19. Butler & Baker's case, 3 Co. 30 b. See Lord Eldon's observations, 2 Ves. jun. 427.

As the law stood previously to this act a will did not pass any real estate which the testator was not entitled to, both at the date of his will, and at the time of his death; it had no effect upon any real estate which might have been acquired in the intermediate time. It is probable that the rule, in this respect, arose partly from the construction given to the word "having" in the Statute of Wills, which had adopted the doctrine then current respecting a devise, considered as an appointment to uses,

and therefore operating only on lands which the testator possessed at the time of making such appointment; and partly from a desire to favour the heir. The effect of it was, to defeat the intentions of testators: even though their intentions might be declared in express words. Neither would lands contracted for pass by the will of the intended purchaser, unless such contract was binding within the Statute of Frauds.

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Langford *v.* Pitt, 2 P. Wms. 629.

Many cases of great hardship were decided against reason, in accordance with this doctrine, which, except where the will has been considered to raise a case of implied condition, so as to put the heir to his election, was held universally; for a distinct principle ruled the seeming exceptions of a tenancy escheated, and a copyhold surrendered, to the lord of a manor, after he had devised the manor. And it must be remembered, that copyholds, which passed according to a will made previously to the purchase of them, if surrendered to the use of such prior will, passed by the surrender, not by the will; the latter operated only as a declaration of uses. The present Act enables a man to devise all the real estate to which he may be entitled at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Churchman *v.* Ireland, 1 Russ. & M. 250.

6 Cru. D. 36.

Attorney-General *v.* Vigor, 8 Ves. 286.

SECT. 4.

Provides, that the dues of the manor shall be still payable to the lord as before, in all cases

Sect. 4. where a devisee claims customary or copyhold estates which might have been surrendered to the use of the will. This is a re-enactment of sect. 2 of 55 G. 3, c. 192, with an additional proviso of a similar kind for cases where the testator shall have devised without having been admitted himself, under the power given by section 3 of this act.

Sect. 5.

Provides, that where a devisee claims customary or copyhold estates which could not have been devised before the passing of this act, the same dues shall be payable to the lord of the manor, as if they had descended to the customary heir. And it enacts that in all cases of devise, an entry of the will shall be made in the court rolls.

Sect. 6.

Re-enacts 29 Ch. 2, c. 3, s. 12, and 14 G. 2, c. 20, s. 9, leaving the law as it was with respect to undevised estates *pur autre vie,* but extending its operation to estates of copyhold, and every other tenure, and also to incorporeal hereditaments, which, as has been stated above, were not mentioned in the former statutes.

CHAPTER III.

THE PERSONS BY WHOM WILLS MAY BE MADE.

SECT. 7.

Age of Testator.

ENACTS, that no person under the age of twenty-one years shall have the power of making a valid will; thus abolishing many distinctions which have obtained at common law, or by particular customs, and which have served to render the rule anomalous and ill-ascertained, without conducing to public utility. *Freehold* estates could not be devised by force of the Statute of Wills, by any person within the age of twenty-one years, who are especially excepted by the 14th section, though, if there has been a local custom, that lands within a certain district should be devisable by all persons of the age of fifteen years or upwards; a devise of such lands by an infant of fifteen years would be good. *Personal* estate could be lawfully bequeathed by persons of more tender age; but it was long unsettled at what age a male and female respectively acquired this testamentary power. However, the rule of the Roman law, which made the testamentary power to commence in males at fourteen, in females at

6 Cru. D. c. 2, s. 5.

Harg. n. to Co. Litt. 89, b. n. (6).

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4th Rep. of R. P. Comm. p. 28.

twelve, has been of late fully established. There seems no reason for any exception to the rule of law, which, for the protection of minors, renders them incapable of making any disposition or contract. The expediency of the alteration in the law, introduced by this section, was much discussed in the House of Commons.—[*See Parliamentary Debates for* 1835.]

Lord Langdale's speech in the House of Lords, Feb. 23, 1837.

In the select committee of that House it was considered, that persons under twenty-one might be entrusted to make their wills, and seventeen was the age there proposed and adopted. But this change was not acquiesced in by the House.

Sect. 8.

Married Women.

34 & 35 H. 8, c. 5, s. 10; 2 Ves. 610; 1 Inst. 33 a; Portland *v.* Prodger, 2 Vern. 104.

The law remains unaltered with respect to the validity of the wills of married women. A woman covert is disabled by the Statute of Wills from devising her lands. But she can appoint lands by will in exercise of a power, where the lands have been conveyed to trustees; and, if her husband has abjured the realm, or been banished for life by act of parliament, she may in all things act as a feme sole, and therefore may devise her lands. And it has been held, that she may dispose of *her* real estate by will, by the agreement of her husband before marriage, without any conveyance to trustees. For her heir, to whom the legal estate will have descended, is considered in equity as a trustee, and bound to convey to her appointee.

Wright *v.* Cadogan; 2 Eden, 239; 1 Bro. P. C. 486, *S.C*; Rippon *v.* Dawding, Ambl. 565.

As to personalty, she may always dispose of it by will, with the assent of her husband; and, where she is executrix, so far as to appoint an executor to the will of her testator. SECT. 7.

Com. Dig. Devise (H. 3); Roper's Husband and Wife, vol. i. 169, 170.

1 Rol. 688. l. 30; 912. l. 13.

CHAPTER IV.

THE MODE OF EXECUTION.

Fourth Rep. of R. P. Comm. p. 12.

BEFORE the passing of 1 Vict. c. 26, there were ten different laws for regulating the execution of wills under different circumstances. 1st. To pass freehold estates in fee-simple by direct devise, either at law or in equity, or to pass equitable estates in such customary freeholds as were not devisable at law, the will must have been in writing, and signed and attested in the manner required by the Statute of Frauds. 2d. To pass leasehold estates, money secured on land, or personal property exceeding the value of 30*l.*, and belonging to any person other than a soldier on service, or a sailor at sea, any writing, however informal, was sufficient; or such property might pass by parol in certain cases, with the evidence required by the statute. 3d. Such property, when not exceeding 30*l.* in value, and also any property belonging to a soldier on service, or a sailor at sea, whatever might be its value, with the exception of the pay, prize-money, &c. of a seaman in the navy, or marine, might pass by parol without any restriction as to evidence. 4th. To pass the pay, prize-money, &c.

29 Ch. 2, c. 3, s. 6.

Ib. s. 19, 20.

of a warrant officer or seaman in the navy, or non-commissioned officer of marines, or marines, the forms required by the statute 11 Geo. 4 and 1 Will. 4, c. 20, must have been complied with. 5th. To pass freehold estates *pur autre vie* at law, the will must have been executed in the same manner as wills of estates in fee-simple; but such property would pass in equity, unless the heir was special occupant, by a will in a form sufficient for personal property. 6th. To pass money in the funds by direct legal devise, the will must have been attested by two witnesses. 7th. Copyholds might pass, both at law and in equity, by a will in a form sufficient to pass personalty, and perhaps, without any restriction as to value, in certain cases, by parol. 8th. Such customary freeholds as would pass by surrender to the use of a will, could not, it was thought, be devised at law without a surrender; but equitable estates in customary freeholds so devisable, might be devised in the same manner as equitable estates in copyholds. 9th. To appoint a guardian, a will must have been attested by two witnesses. And 10th. To exercise a power of appointment by will, it was necessary to comply with any forms which might be required by the terms of the power.

1 G. 1, st. 2, c. 19, s. 12.

Wagstaff *v.* Wagstaff, 2 P. W. 258; Attorney-General *v.* Barnes, 2 Vern. 598; Habergham *v.* Vincent, 2 Ves. J. 204.

12 Cha. 2, c. 24.

10 Rep. 144, a; Hob. 312.

All these ten distinct modes of disposing of property by will, varying according to the nature or amount of the property, or the character of the devisor, are now, with the exception of the

fourth partly and also of the fifth, reduced to one simple form, which seems sufficient to meet the exigencies of every case. This is accomplished by Sections 9, 10, 11, 12.

SECT. 9.

Enacts,

1. That every will shall be *in writing.*
2. That it shall be *signed,* at the *end,* by the testator, or by some other person in his presence, and by his direction.
3. That such signature shall be made or acknowledged in the *simultaneous presence* of *two* witnesses.
4. That such witnesses shall subscribe the will *in the presence of the testator.*

Writing. 1. That every will shall be in *writing.*—This is a general enactment for every kind of property that can be disposed of by will. It will be seen by the recapitulation, made above, of the various rules for the execution of wills of different descriptions, before the passing of this act, that writing was not necessary in several cases. The only exceptions now to the necessity of writing, are provided by the 11th and 12th sections, in favour of soldiers and mariners. The power of making a nuncupative will was very rarely exercised, and, in the present general state of education, can scarcely ever be required.

Signature at end. 2. That it shall be *signed* at the *end* by the

testator, or by some other person in his presence, and by his direction.—This provision, that the signature of the testator shall be at the *end*, is introduced in conformity to the usual practice in signing all written instruments, and in order to cause wills to be made in a formal manner, and so avoid the uncertainties and inconveniences which are consequent upon imperfect papers being considered wills. SECT. 9.

Formerly, if the testator's name was written by himself, in any part of a will, either at the beginning or the end, it was considered a sufficient signing within the statute. And three of the judges in the case of Lemayne *v.* Stanley, were of opinion that sealing by itself was a sufficient signing within the Statute of Frauds, which doctrine was assented to in Warneford *v.* Warneford. Yet this was afterwards controverted by the judges in several cases. [Smith *v.* Evans, 1 Wils. 313; Ellis *v.* Smith, 1 Ves. J. 11; Harrison *v.* Harrison, 8 Ves. 185; Abdy *v.* Grix, 8 Ves. 504; Wright *v.* Wakeford, 17 Ves. 459.] But the name must have been inserted in such a manner as to give authenticity to the whole instrument. And where the testator signed the two first sheets of his will, with the intention of signing the remaining sheets, which he was prevented by sickness from doing, Lord Mansfield held that the will was not duly executed. The signature might be either the name of the testator, or his mark; and this remains unaltered.

Lemayne *v.* Stanley, 3 Lev. 1; Morison *v.* Turnour, 18 Ves. 183.

2 Stra. 764.

Stokes *v.* Moore, 1 P. W. 771.

Right *v.* Price, Doug. 241.

SECT. 9. *Attestation.*

3d. That such signature shall be made or acknowledged in the *simultaneous presence* of *two* witnesses.

Two material alterations in the law are here effected. Firstly, that the witnesses shall in all cases be two in number; secondly, that they shall be both present together. For the due execution of a will, according to the Statute of Frauds, it was held not to be requisite that the witnesses should attest in the presence of each other, or that one should be seen by another. It was sufficient if the testator acknowledged his signature, or his will, at three several times to the three several witnesses: moreover it was enough, if, without acknowledging his signature, and without the witnesses knowing that it was his will, he asked them to sign it. The attestation of witnesses to wills of personal estate has been long considered desirable. Lord Alvanley said, he concurred in the opinion dropped at the bar, that it was almost absolutely necessary that the legislature should come to some regulation as to the form necessary for wills of personal as well as real estate, from the habit the Spiritual Court had got into, of granting probate of all the loose papers that could be found, and sending them to the Court of Chancery to be construed. Again Lord Loughborough: "It is really very unfortunate that there is no solemnity necessary for wills of personal estate." And Lord Eldon, in Matthews *v.* Werner, with reference to a paper in that cause, said, "If such

Cook *v.* Parsons, Prec. Cha. 184; Ellis *v.* Smith, 1 Ves. J. 11; Westbeech *v.* Kennedy, 1 Ves. & B. 362; Stonehouse *v.* Evelyn, 3 P. W. 254.

British Museum *v.* White, 3 Mo. & Pay. 689.

Coxe *v.* Bassett, 3 Ves. 160.

Beauchamp *v.* Earl of Hardwicke, 5 Ves. 285.

8 Ves. 208.

a thing as this is to be proved as a will, it calls loudly upon the legislature to make some regulation as to the disposition of personal property, so as that there should be something of solemnity, certainty, and precision, in order to give away that property, and defeat the natural rights of the relations." Sect. 9.

On the other hand, with respect to the three witnesses required by the Statute of Frauds, Lord Mansfield is recorded to have said, "The legislature meant only to guard against fraud by a solemn attestation, which they thought would soon be universally known, and might very easily be complied with. In theory, this attestation might seem a strong guard; it may be some guard in practice; but I am persuaded many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it." 1 Burr. R. 420.

The present enactment, that every will shall be attested by two witnesses, is in accordance with the recommendations of the Ecclesiastical, as well as the Real Property Commissioners. Page 33. Page 17.

4th. That such witnesses shall subscribe the will in the presence of the testator. *In Testator's Presence.*

This was a provision of the Statute of Frauds: its object was lest another will should be substituted instead of the real one; but it has been so far disregarded that the Courts have not required that the testator should actually see the witnesses sign; but have considered it sufficient if he might

Sect. 9.

Shires *v.* Glascock, 2 Salk. 688; Casson *v.* Dade, 1 Bro. 99.

see them in possibility, as through a broken window, or where he is in a carriage in the street, and they are in a room with a window towards the street. This looseness in construing these words has given rise to many doubtful cases, in which the question between the litigating parties has been—in what position the testator was lying in his bed, and other circumstances equally minute and difficult of proof. The Real Property Commissioners recommended the omission of this condition, in order to avoid the question as to what constitutes presence according to the construction which has been put upon that word.

Doe *v.* Manifold, 1 M. & S. 294.

Sect. 10.

In Execution of Powers.

Relates to wills made in exercise of powers, and enacts, that the solemnities required by the act for the execution of all wills, shall alone be requisite for a due execution of a power, notwithstanding other solemnities may be expressly required by such power.

Fourth Report of Real Property Commissioners, p. 12.

Previously, every combination of the solemnities which the law had made necessary for the due execution of wills of different descriptions, and several solemnities not required by any law, were found to be occasionally prescribed by different powers of appointment. On the other hand, if the power, as to freehold property, was given to any other person than the owner, it was thought that it might be authorized to be exe-

cuted by a will made without the solemnities required by the Statute of Frauds. Again, if the owner of freehold property by his will, duly attested, charged his estates with legacies generally, he might by an unattested codicil give legacies which would be payable by virtue of such charge. Sect. 10.

There have been a great many cases, in which the question has been, whether there has been a due execution of a power. These will probably be obviated in a great degree by this section.

Wagstaff *v.* Wagstaff, 2 P. W. 258; Attorney-General *v.* Barnes, 2 Vern. 598; Duke of Marlborough *v.* Godolphin, 2 Ves. 76; Jones *v.* Clough, 2 Ves. 366; Duff *v.* Dalzell, 1 Bro. C. C. 147; Tuffnell *v.* Page, Barnard. 9; 2 Atk. 37; Attorney-General *v.* Andrews, 1 Ves. 225; Dormer *v.* Thurland, 2 P. W. 506; Ross *v.* Ewer, 3 Atk. 156; Guy *v.* Dormer, T. Raym. 295; 54 Geo. 3, c. 168.

Sect. 11.

Re-enacts the 23d section of the Statute of Frauds, and

Sect. 12.

Saves the provisions of 11 Geo. 4, and 1 Will. 4, c. 20.

Sect. 13.

Publication was some act of the devisor from which it could be concluded, that he intended the instrument so published to operate as a will. In *Publication.* Cru. Dig. VI. 65.

SECT. 13.

Peate v. Ongley, 1 Com. R. 196.

Trimmer v. Jackson, 4 Burn's Eccl. Law, 119.

Per Lord Hardwicke, C., 8 Atk. 161.

4th Rep. of R. P. Comm. p. 20.

evidence of this act an indorsement was usually made. Thus the words "signed and published by the said A. B., as and for his last will and testament," were sufficient evidence of publication; and where the words "sealed and delivered" were put above the place where the witnesses were to subscribe, it was adjudged that this was a sufficient publication. This publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form; and perhaps, when an instrument had not been attested, it might be reasonably doubted, whether it was finally determined upon as complete, or whether it was intended to be kept as a subject for consideration; and therefore some act might be held necessary to show a final intention of giving effect to it. But the act of signing or acknowledging it in the presence of witnesses, is as complete a declaration of intention as could be made by any form of words; and now this is made indispensable, there appears to be no occasion for imposing the further ceremony of publication. These are the probable reasons which induced the legislature to dispense with the publication of wills in future, by the enactment of this clause.

Qualification of Witnesses.

4th Rep. of R. P. Comm. p. 19.

SECT. 14.

The Statute of Frauds required "credible" witnesses for the attestation of a will: and upon that expression several questions arose.—1st,

What was meant by credible witnesses?—2d, Whether, if not credible at the time of the execution of the will, they could become credible by any subsequent occurrence?—3d, Whether witnesses, who were not credible on account of their having had interests given to them by the will, were credible witnesses to support the will for the benefit of other parties? These questions occasioned considerable litigation. It was held, that persons taking any direct or indirect benefit under the will, even creditors, where debts were charged on freehold estates by the will, were not credible witnesses, but that persons so circumstanced became credible, when they had received or released their interests. To remove some of the inconveniences of the decisions, that persons entitled to benefits under the will were not credible witnesses, it was thought necessary to pass an act, 25 Geo. 2, c. 6, (which is said to have been prepared by Lord Hardwicke,) to declare that such persons should be credible, but that any gift to them should be void. But this act was not effectual in removing all the difficulties that had arisen upon the construction of the word "credible;" for the case of Wyndham and Chetwynd came into consideration soon afterwards, in which the question was, whether persons who were creditors at the time of attestation, though their debts were discharged before the day of trial, were credible witnesses within the Statute of Frauds. One feature of this case

SECT. 14.

Burn's Eccl. Law, 73. Hudson's case; Anstey v. Dowsing, Stra. 1253; Hillyard v. Jennings, Carth. 514. Baugh v. Holloway, 1 P. W. 557.

1 Burr. 417.

Sect. 14.

was, that the real estate was only charged with the payment of debts, as an auxiliary fund to the personalty; which stood in need of no assistance, being itself much greater than the debts. Lord Mansfield discussed the question at length in delivering the opinion of the Court, that the will was duly attested. The same question afterwards arose in Hindson and Kersey, in which the three puisne judges of the Court of Common Pleas, agreed with the doctrine laid down in Wyndham *v.* Chetwynd; but Lord Chief Justice Pratt, in a laboured argument, declared his opinion against it: that the Statute of Frauds had prescribed a certain method which must be punctually observed; that if the witnesses were interested at the time of the attestation, though their interest was contingent and future, and extremely minute, yet that the incompetency could never be purged, and that the whole will was void for ever. Then came the case of Hatfield *v.* Thorp, in which an estate in fee, upon the determination of a life estate, was devised to the wife of Thomas Hatfield, who was one of the attesting witnesses to the will. The testator died in 1779, and the wife of Thomas Hatfield died in 1813, before the previous life estate was determined. It was certified by the Judges of the King's Bench, that the will was not duly executed so as to pass any real estate to Mrs. Hatfield. The present clause respects these cases, and enacts, that no will shall be invalid by reason of an attesting witness being

4 Burn's Eccl. Law, 85.

5 B. & A. 589.

at any time incompetent to be admitted to prove the execution of it. SECT. 14.

SECT. 15.

Gifts to a Witness void. Sect. 1.

It happened that the title and preamble of 25 Geo. 2, c. 6, referred to wills of freehold estates only, while the enacting clause extended to "any will and codicil." Hence arose a doubt. Sir W. Grant decided in Lees *v.* Somersgill, that the act extended to all wills and codicils, as well of personal as of real estate. On the other hand, Sir John Nicholl held a contrary opinion, which was affirmed by the delegates; and followed by Sir John Leach, M. R., in Emanuel *v.* Constable, and by the present Vice Chancellor, in Foster *v.* Banbury. The present clause, which re-enacts Section 1 of the above act, refers to any will, either of real or personal estate; and enacts, that a devise or bequest to an attesting witness, or to the wife or husband of an attesting witness, shall be void.

17 Ves. 508.

Brett *v.* Brett, 3 Add. Eccl. R. 210; 1 Hagg. Eccl. R. 582.

3 Russ. 436.

3 Sim. 40.

Hatfield *v.* Thorp, 5 B. & A. 589.

SECT. 16.

Creditor attesting.

Re-enacts the second section of 25 Geo. 2, c. 6, with respect to creditors attesting being admitted witnesses to prove the execution of the will, or the validity or invalidity thereof. This also is extended to wills of personal estate.—[Wyndham *v.* Chetwynd, 1 Burr. 417.]

SECT. 17.

Executor attesting.

12 East, 250.

In Bettison *v.* Bromley, which was an issue directed by the Master of the Rolls, to try whether a paper writing, purporting to be a will, was executed so as to pass real estate, the question before the Court of King's Bench was, as to the competency of one of the attesting witnesses, who was the wife of an acting executor. The Court concurred in opinion, that the will was well proved. The executor took no interest under the will, but only a burdensome office. The same point was again argued in Phipps *v.* Pitcher, 6 Taunt. 220, and decided in the same way. The enactments of this section are in conformity with these decisions.

CHAPTER V.

THE REVOCATION, ALTERATION, AND REVIVAL OF WILLS.

Revocation of Wills.
4th Report of Real Property Commissioners, p. 25, et seq.
6 Cru. Dig.

It is an essential property of every will to be revocable at any time during the life of the testator: so that although a person should declare his will to be irrevocable, in the strongest terms, yet he may revoke it; because his own acts or words cannot alter the disposition of the law, so as to make that irrevocable which, in its nature, is revocable.

The revocation of a will might be either express or implied, and a great variety of rules had been established applicable to this subject; and numerous inconveniences had arisen, which it is the purpose of the present act to simplify and remedy. We will pursue the order observed in the clauses of the act.

Sect. 18.

Marriage.
4th Rep. 61; 2 P. W. 624.
Christopher *v.* Christopher, cit. 4 Burr. 2182; Phragge *v.*

Enacts, "that every will made by a man or woman shall be revoked by his or her marriage." This is no alteration of the law with respect to a woman's will. But with respect to a man's will the rule has been, that it was revoked by his marriage and the birth of a child, even of a post-

Sect. 18.

Stone, Ambl. 721. 5 T. R. 49; 1 Ves. & B. 465; Jackson *v.* Hurlock, Ambl. 488; S. C. 2 Eden, 63. Kenebel *v.* Scrafton, 2 East, 541; Brown *v.* Thompson, 1 Eq. Ca. Abr. 413; Ex parte Ilchester, 4 Ves. 849.

humous child, but not by marriage alone. These were both *implied* revocations; it being, as Lord Kenyon observed, in Doe *v.* Lancashire, 5 T. R. 58, a tacit condition, annexed to the will when made, that it should not take effect, if there should be a total change in the testator's family. But numerous difficulties have arisen from this rule of law, upon evidence of circumstances showing the revocation to be unnecessary; and it has been a doubted point, whether parol evidence of intention was admissible to rebut the presumption.

Brady *v.* Cubitt, Doug, 31; Gibbons *v.* Caunt, 4 Ves. 848. 4th Rep. 32.

The Real Property Commissioners thought that the inconveniences of this rule preponderated over its advantages, and therefore recommended that it should be abolished. And they stated their reasons for altering the law in this particular to be the numerous exceptions which have been made to the rule, and the variety of doubts and consequent litigation which have arisen from it. Great trouble and expense in the investigation of titles were produced by it, because it rendered necessary inquiries and evidence on every sale or mortgage of any real or leasehold estate, where the title was traced through a will, and it was possible that the testator might have married and had a child subsequently to the making of it: and where erroneous information was obtained, the title was rendered unsafe.

Some of these objections may still be made to the law as it now stands altered. But there will

be no longer ground for litigation, as formerly, upon evidence of the testator's intention: the revocation being no longer implied, but actually consequent upon the fact of marriage. Sect. 18.

There is one exception to this enactment, viz. the case of a will made in exercise of a power of appointment; when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions.

Sect. 19.

Alteration of Circumstances.

A great many questions have arisen out of the doctrine that wills were revoked by implication, founded upon a presumption of intention on account of an alteration in the circumstances of the testator. These cases have for the most part involved marriage and the birth of children, which events may happen under circumstances so various, as to render it impossible to imply any intention as generally consequent thereon. The last section has expressly made the act of marriage a revocation of a prior will. The present enacts that no will shall be revoked by any presumption of intention grounded on a change of circumstances: so that an invalid marriage would be no revocation under the statute; and evidence would not be admissible to show that the testator believed that the marriage was legal,

Sect. 19. and that his prior will was revoked by such supposed legal act. This clause will exclude all such questions as arose on this subject in the cases of Doe *v.* Lancashire, 5 T. R. 58; Christopher *v.* Christopher, cit. 4 Burr. R. 2182; Kenebel *v.* Sceafton, 2 East. 541; Sheath *v.* York, 1 Ves. & B. 413; Sullivan *v.* Sullivan, 1 Phill. Ecc. R. 343; Gibbons *v.* Caunt, 4 Ves. 848; Ex parte Ilchester, 7 Ves. 348; Brown *v.* Thompson, 1 Eq. Ca. Abr. 413; where evidence of circumstances showing the revocation to be unnecessary was admitted. It was declared, in Johnson *v.* Johnson, that the birth of children, combined with other circumstances, could revoke a will of personal property made after marriage. But the birth of a child was held no revocation of a will made after marriage in the case of Doe *v.* Bradford, 4 M. & S. 10.

1 Phill. Ecc. R. 447.

Sect. 20.

Form of Revocation. This section follows the provisions of the sixth section of the Statute of Frauds, and defines the form to be observed in revoking a will by an express act. This may be done by another will or codicil duly executed, or by any writing executed like a will, and declaring an intention to revoke, or by destruction with such intention. In the Statute of Frauds there is a difference in the forms prescribed for executing wills and writings of revocation; the former being required to be attested in the presence of the tes-

Sections 5 & 6. Onions *v.* Tyrer, 1 P. W. 343.

tator, but not required to be signed in the presence of the witnesses; while the latter is required to be signed in the presence of the witnesses, but not required to be signed by the witnesses in the presence of the testator. This is avoided in the present act. In other respects it is apprehended that the principle which has regulated the decisions upon the subject of the revocation of devises of real estates under the sixth section of 29 Car. 2, will still obtain in considering the direct revocation of wills, both of real and personal property, under 1 Vict. c. 26. It is apprehended that subsequent void devises, as a devise to a charity, or a devise contrary to the rule against perpetuities, will still be held to be revocations of prior inconsistent wills. SECT. 20.

A slight difference is further observable in the wording of this section, and of the sixth section of the Statute of Frauds, with regard to cancellation. The words used in the Statute of Frauds are *burning*, *cancelling*, *tearing*, or *obliterating*. In this statute the words are *burning*, *tearing*, or *otherwise destroying, with the intention of revoking:* the words *cancelling* and *obliterating* being omitted. The obliteration of any portion of a will is provided for by the next section. The intention of the testator has always governed the decisions which have been made upon the sufficiency of the act of cancelling; therefore the addition of the words—*with the intention of re-*

Cowp. R. 52; Hyde *v.* Hyde, 1 Ab. Eq. 409; 1 P. W. 344; Mr. Cox's note; Bibb *v.* Thomas, 2 Bl. 1043; Doe *v.* Perkes, 3 B. & A. 489.

Sect. 20.

voking—will effect no alteration in the principle to be observed on this head.

4th Report of Real Property Commissioners, p. 30.

Before the passing of 1 Vict. c. 26, wills of copyholds and customary estates not being within the Statute of Frauds, and also testamentary appointments of guardians, might be revoked by parol. It was also doubtful whether devises of estates *pur autre vie* might not be revoked in the same manner.

Sect. 21.

Obliteration, &c.

This section enacts, that no obliteration, interlineation, or other alteration in a will shall have any effect, unless executed as a will. Though the Statute of Frauds declared, that a devise should be revocable by cancelling or obliterating the will, yet such acts have not been held to be in themselves conclusive revocations. They have been considered to be equivocal acts, and to afford only a presumption of an intention to revoke, which might be rebutted by parol or other evidence, that they were done under an erroneous impression, or in sport. [See cases cited at page 63.] When there were duplicates of a will, the cancelling of one part afforded a slighter presumption of an intention to revoke than the cancelling of both, and in all cases the strength of the presumption has depended upon the circumstances, and upon the fact of the cancelling the duplicate being done *animo revocandi*. And where the cancelling was begun *animo revocandi* and left

Fourth Report of Real Property Commissioners, p. 25.

Cru. Dig. vol. vi.

2 Vern. 742; 1 P. W. 346; Burtenshaw *v.* Gilbert, Cowp. 49.

Mason *v.* Limbery, 4 Burr. 2515.

incomplete, it was presumed that the testator repented and stopped before he had completed the act of revocation. Sect. 21. Doe *v.* Perkes, 3 B. & A. 489.

In Burkitt *v.* Burkitt it was held, that a testator might cancel his will in part, by obliterating some of the devises contained in it subsequently to its execution. But it must be a matter of difficulty to ascertain the intention and effect of obliterations and interlineations made in a complete instrument, by an unlearned testator. See the cases of Sutton *v.* Sutton, Cowp. 812; Winsor *v.* Pratt, 2 Brod. & Bing. 650; Larkins *v.* Larkins, 3 Bos. & Pul. 16; Short *v.* Smith, 4 East, 419. Therefore it seems highly expedient that no alteration should be made in a will without observing the same formality which was necessary to be observed at its original execution. 2 Vern. 498.

Sect. 22.

Revival.

Before the passing of this act, a will with respect to freehold estates, which had been revoked and made void, might be revived by republication; or, if revoked by another will, might be revived by a codicil, which would have the effect of revoking such other will; or might be revived, though not re-published, by the cancelling or destroying the subsequent will. And a will with respect to personal and copyhold estates might be revived by mere parol declarations, or even by parol evidence that the testator treated it as unrevoked. Re-publication is abolished by

Fourth Report of Real Property Commissioners, p. 33. Harwood *v.* Goodright, Lofft. 576. Goodright *v.* Glazier, 4 Burr. 2512. See *contrà* Ex parte Hillier, 3 Atk. 798.

Sect. 22. the present act, and now no will can be revived except by re-execution, or by a codicil showing an intention to revive or confirm the will.

There is a particular provision that if a will shall have been partly revoked before the revocation of the entire will, any subsequent revival shall not extend to the part previously revoked, unless such intention shall be manifest.

Fourth Report, p. 34. The Real Property Commissioners suggested an exception to this clause, in the case of a will

There are the circumstances of Goodright *v.* Glazier. which has been wholly or partially revoked by a subsequent will or codicil, and is left perfect, while the subsequent will is cancelled, or otherwise destroyed. If this exception were not allowed, they thought that wills might be defeated by parol evidence that subsequent wills had been made and destroyed.

Forse and Hembling's case, 4 Co. 60. This section settles the doubt which has been current so long, whether the will of a woman, which has been revoked by her marriage, is revived by the death of her husband in her lifetime.

Sect. 23.

Alteration of the Estate. It was an established rule of law, that any alteration of the estate in lands, devised by the

Cru. Dig. vol. vi. c. 6. act of the devisor after the publication of his will,

Fourth Report of Real Property Commissioners. operated as an implied revocation of such will: and this doctrine was founded on the following reasons:—1st. On the favour which the common law shows in every instance to the heir; 2d. On the principle that a devisor must not only be actually seised, but must also continue to be so

seised till the time of his death; 3d. Because any alteration of the estate devised was considered evidence of an alteration in the intention of the devisor. SECT. 23.

Some of the revocations dependent upon this rule are essential to the nature of a will; such as an entire or partial disposition of the property by sale or mortgage; or an agreement for valuable consideration to sell or to settle, which would be sustained in equity against a devisee, to whom the legal estate had passed by the will. These must necessarily be revocations, either entire or pro tanto, of a will comprising the same property; because, at the death of the testator, when the will begins to take effect, the subject of it is no longer the property of the testator, and therefore he can then have no disposing power over it.

Sparrow *v.* Hardcastle, Amb. 224; 3 Atk. 799; Arnold *v.* Arnold, 1 Bro. 401; Rider *v.* Wager, 2 P. W. 328; Cotter *v.* Lager, *ib.* 622; Hawser *v.* Jeffrey, 16 Ves. 519; Rawlins *v.* Burgis, 2 Ves. & B. 382.

But in consequence of the same rule, a feoffment, or any other conveyance to the use of the testator himself, or where the use resulted to him, or a fine or recovery to strengthen his title, or even made expressly to give effect to his will, or a conveyance of the legal estate, not limited to the devisor precisely as the equitable estate was held by him at the time of the devise, would operate as a revocation of it. So in case of an exchange, the estate received in exchange would not pass by the will; nor would an allotment under an enclosure act, unless the act contained the clause usually introduced for making allotments pass under existing wills.

Dyer, 143, b; Lincoln's case, 1 Ab. Eq. 411; Show. Pa. Ca. 154; Pollen *v.* Huband, 1 Ab. Eq. 412; 7 Bro. P. C. 433; Hicks *v.* Mors, Amb. 215; Parsons *v.* Freeman, 3 Atk. 741; Bullin *v.* Fletcher, 1 Keen. 369, and cases cited; Attorney-General *v.* Vigor, 8 Ves. 256,

Sect. 23. And there is another class of cases, in which the Courts, contrary to the provision of the Statute of Frauds, held wills to be revoked, on the evidence of intention to alter the estate, although such intention was never completely carried into effect. Thus a feoffment without any livery, or a bargain and sale without enrolment, a defective recovery, or any other instrument which has no effect as a conveyance until some other act was done to complete it, and a contract for sale which had been rescinded, were held to operate as revocations; though not deeds or contracts of themselves imperfect or void.

1 Roll. Ab. 615; 3 Atk. 73; *Ib.* 803; Shore v. Pincke, 5 T. R. 124.

Fourth Report of Real Property Commissioners, p. 28. Note (*c*).

These revocations, implied from the alteration or intended alteration of the estate, manifestly defeated the intention of the testator in most instances where they occurred; and met with the frequent disapprobation of the judges, but the rule was too firmly established to warrant a judge in applying his authority to remedy the evil, however universally acknowledged. (1 Keen, 375.)

The rule did not hold with respect to wills of personalty.

Ib. p. 32. Thus the laws relating to the revocation of wills, which were, as we have seen, so complicated and incongruous, are by this act reduced to a few very simple rules applicable to wills of every description. There are now only four modes in which any will can be revoked:—1st.

By another inconsistent will or writing, executed in the same manner as the original will; 2d. By cancellation, or any other act of the same nature; 3d. By the disposition of the property by the testator in his lifetime; and 4th. By marriage. By the first and third of these modes, the will may be revoked either entirely or in part; by the second and fourth the revocation will be complete.

There are now only four modes of revoking a will.

CHAPTER VI.

RULES OF CONSTRUCTION.

Sect. 24.

Time of Wills' Speaking.

S. 3.

It is here provided that the will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator. A power was given above of devising subsequently acquired lands, by a specific description. By the present clause, subsequently acquired lands will pass under a general devise of all real estate, which overrules the principle established by Butler and Baker's case, 3 Rep. 30; and Bunker *v.* Cook, 11 Mod. 121; 3 Bro. P. C. 19.

Sect. 25.

Lapsed and void Devises.

Lord Langdale's speech in the House of Lords, Feb. 23, 1837.

Provides that a residuary devise shall include lapsed and void devises. This follows almost necessarily from the last provision, which makes the will speak from the death of the testator; but the legislature has thought fit to remove all doubt, by making the declaration.

SECT. 26.

Operation of a general Devise of Lands upon Customary Copyhold, and Leasehold Estates.

When it was necessary to the legal operation of a devise of copyholds, that they should have been surrendered to the use of a will, the rule was, that copyholds, not so surrendered, would not pass under a general devise of land, unless the devisor had no freehold land upon which it might operate; in which case the copyholds were held to pass, *ut res magis valeat quam pereat:* and then equity supplied the surrender in favour of certain objects, but not universally.

2 Sharman's Powell on Devises, chap. 7.

But after the 55 Geo. 3, c. 192, had dispensed with the necessity of surrenders to the use of wills, an opinion arose in the profession that a general devise operated indifferently upon freeholds and copyholds; and this opinion was judicially confirmed by Lord Eldon, with the assistance of the two Chief Justices, in White *v.* Vitty, 2 Russ. 484 and 4 Russ. 584. But the statute of 55 Geo. 3, c. 192, was by no means of universal operation, and, therefore, it is probable that many cases would, in course of time, be excepted from the rule laid down in White *v.* Vitty; and hence the expediency of the present provision that customary and copyhold estates shall pass by a devise *pari passu* with freehold estates, under words of general import.

Vide supra, p. 33.

With respect to the operation of a general devise upon leaseholds, Rose *v.* Bartlett was the leading authority, that "where a man held lands

2 Sharman's Powell on Devises, p. 8; Cro Car. 293.

Sect. 26. in fee and lands for years, and devised all his lands and tenements, the fee simple lands passed only, and not the leases for years; but if he had no fee simple, the leases for years passed." The former proposition was much controverted in a series of cases, but finally established on firm authority. But as it was often denounced as subversive of the intention of testators, the legislature has now come to the assistance of the judges and overruled the doctrine, by declaring that a general devise shall include the testator's leasehold as well as freehold estates, unless a contrary intention shall appear by the will.

Sect. 27.

Upon Estates over which the Testator has a general Power of Appointment.

This section provides that a general devise or bequest of all the testator's real and personal estate shall be held to include property over which he has a general power of appointment. If no reference was made to the power, the only cases in which it was held to be executed under the general words of a will, were, either where the words could not be satisfied without its operating as an appointment, or where there was some description of or allusion to the property which was the subject of the power, or, in the case of personal estate, very clear internal evidence of the intention: but the Court would not inquire into the circumstances of the property where the will had no reference to the power or the subject of it.

1 Jac. & W. 357; Walker *v.* Mackie, 4 Russ. 76; Nannock *v.* Horton, 7 Ves. 391.

Thus where a testator having a power of appointment over certain freehold and copyhold estates, and being also seised of other freehold estates, devised all his freehold and copyhold estates without reference to the power, this was held an execution of the power as to the copyhold estates, but not as to the freehold estates, which were subject to the power. This doctrine had been established by a series of prior cases, to which it is unnecessary to refer. SECT. 27. Lewis *v.* Lewellyn, 1 Turn. & R. 104.

Again, as to personal estates, in a late case where a married woman, having a power to appoint leaseholds and stock by her will, which was executed and attested as required by the power, but did not refer to it, gave to her husband the whole of her property, both real and personal, and whatsoever she might possess at her decease; this was held not to be an execution of the power in conformity with the prior cases of Jones *v.* Curry, 1 Swanst. 66; Webb *v.* Honnor, 1 Jac. & W. 352, and many others. Lovell *v.* Knight, 3 Sim. 275.

These cases are sufficient to illustrate the doctrine to which they refer, and to show the expediency of an alteration; though there have been a great many other decisions upon the subject, by most of which it is probable that the real intention of the testator was sacrificed to the rule of construction which had been adopted by the Courts. The present section seems to be sufficient to prevent such disappointment of intention for the future.

SECT. 28.

A Devise without Words of Limitation.

Lord Langdale's speech in the House of Lords, Feb. 23, 1837.

Because the words "lands and tenements" do not of themselves designate the quantity of estate or interest for which they are held, and in common parlance, when a man speaks of his house, or of his lands, as property which he has a right to dispose of, he means his whole right to it; it often happens, that a man, making his will without competent legal advice, gives his house, or his lands, at such a place to such a person, without adding any word of limitation or inheritance. To common understandings, and out of the Courts, his meaning is clear and obvious, to give all his interest in the house, or in the lands, to his devisee. But till the passing of this act, the established rules of construction intervened to thwart the plain intention of the testator, and if there were no other words in the will to help that plain intention, the devisee took only an estate for life. Although this construction of words against their intended meaning originated, without doubt, in the old rules against disinheriting an heir, except by plain words or necessary implication, yet it was upheld even where the testator, by the same instrument, showed his wish and intention to disinherit his heir-at-law, by giving him a legacy of one shilling or a few shillings, agreeable to the vulgar notion, taken from the Roman law, that an heir is cut off with a shilling. In Right *v.* Sidebotham, Lord Mans-

Right *v.* Sidebotham, Doug. 759; Right *v.* Russell, cit. ib. 761; Denn *v.* Gaskin, Cowp. 657.

field said, "I verily believe, that, almost in every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law however is established and certain, &c. I have no doubt but the testator's intention here was to disinherit his heir at law, as well as in the case of Denn *v.* Gaskin." Sect. 28.

The object of the legislature was to negative this established rule of law, without however enacting any positive rule which might in its turn disappoint the testator's intention. This is saved by the words "unless a contrary intention shall appear by the will."

Sect. 29.

Words importing Failure of Issue.

Sharman's Powell on Devises, ii. 564.

Lord Langdale's speech in the House of Lords, 23 Feb. 1837.

Few questions of construction have involved more frequent discussion, than that which arose upon words importing a failure of issue, whether they referred to issue indefinitely, or issue living at the death. Upon this question depended their operation to confer an estate tail, which is created necessarily by the former construction.

For example, suppose a devise of real or personal estate to A., with a limitation over, *if he die without issue*, or, *if he have no issue*, or, *if he die before he has any issue*, or, *for want*, or, *in default of issue*. Of the meaning and intention of the testator, there could be little doubt. No one

SECT. 29.

From Beauclerk *v.* Dormer, 2 Atk. 308, to Barlow v. Salter, 17 Ves. 479; and Donn *v.* Penny, 1 Mer. 20.

who considers the ordinary sense of the words, can doubt, that he meant *issue living at the time of A.'s death.* But it was established by a long series of cases, that these expressions, unexplained by the context, whether applied to real or personal estate,* imported a general indefinite failure of issue, i. e. a failure of issue at any period, however remote. Consequently that they created in A. an estate tail in the realty, or an absolute interest in the personalty.

Forth v. Chapman, 1 P. W. 663, and succeeding cases.

To this forced rule of construction there was made one whimsical exception; when the words happened to be, *if he die without* LEAVING *issue.* These words were held to bear two distinct meanings, accordingly as the property might be real or personal, importing an indefinite failure of issue with respect to real estate, and a failure of issue living at the death with respect to personal.

It is unnecessary to discuss the unreasonableness of this technical exposition of words, which seem plain enough to an unlearned man. The judges have long declared its absurdity and lamented its effect: for devisees claiming under bequests which depended upon the contingency expressed by such words as "*if he shall die without issue,*" &c. without any other words to restrict them, have been one after another shut

* There was a distinction taken between real and personal property in some of the early cases. Pleydell *v.* Pleydell, 1 P. W. 748; Nichols *v.* Hooper, ib. 198; and other cases which were decided before Beauclerk *v.* Dormer.

out from the benefits manifestly intended for them, because judges have felt themselves bound to administer the law as they have found it, and to adopt the established construction, that these words alone, and by themselves, must be considered to mean "*be dead without issue living at any future time,*" and consequently that limitations over upon them were void. Sect. 29.

The present section enacts, that all these expressions, or any other, which may import either a want or failure of issue of any person in his life-time, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a failure of issue living at the death, unless a contrary intention shall appear by the will.

A proviso follows saving those cases, where the words "*no issue*" mean "*no such issue,*" with reference to issue previously described; as in Morse *v.* Lord Ormonde, 1 Russ. 382; and Radford *v.* Radford, 1 Keen. 486.

Sects. 30 & 31.

Continuance of Estate in Trustees and Executors.

When trust estates had arisen upon the construction which the judges gave to the Statute of Uses, it became a common question, where estates were given to trustees or executors for particular specified purposes, how far the statute had operation in executing the estate in the persons beneficially entitled, subject to the accomplishment of those purposes; and in considering the

Sects. 30 & 31. cases which arose upon wills, the intention of the testator was made the rule for governing his expressions. But the intention of testators was not always clearly expressed as to the continuance of the estate devised to the trustees or executors, whether he intended the whole legal estate to continue in them, or whether only for a particular time or purpose; for it might be necessary, for the full execution of the trusts, that the legal estate should remain in them for a limited period only, although the words of limitation imported a fee. And again, a chattel interest only might be given in words, but an estate in fee might be necessary for the execution of the trusts:—as a trust to sell or raise money. In cases of this kind, the Courts came to consider the legal estate to be vested in the trustees as long as the execution of the trusts required it, and no longer; that from that time it became vested in the persons beneficially entitled. Lord Ellenborough settled this doctrine in Doe *v.* Simpson, in his judgment upon which case he said, "The cases of Shapland *v.* Smith and Sylvester *v.* Wilson, appear to establish, that if an estate for life be left to trustees and their heirs, in trust to pay the profits, or an annuity out of them, to another for life, and after the death of the annuitant, or person entitled to the profits, if the estate be given to, or to the use of, another, in such case the trustees take only an estate for the life of the cestui que trust or the annuitant,

Harton *v.* Harton, 7 T. R. 652; Chapman *v.* Blisset, Forrest. R. 145.

Bagshaw *v.* Spencer, 1 Ves. 143.

Say and Sele *v.* Jones, 1 Ab. Eq. 383.

5 East, 162.

1 Bro. C. C. 75.

2 Term R. 444.

and the remainder over is executed by the statute; and the authorities referred to, viz. Co. Lit. 42 a, and Sir W. Cordell's case, 8 Co. 96, establish the proposition, that if an estate be devised to executors generally, for payment of debts, they will take only a chattel interest; from whence it appears to be a fair inference, that where the purposes of a trust can be answered by a less estate than a fee-simple, that a greater interest than is sufficient to answer such purpose shall not pass to them; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute." A similar point was argued before the judges of the King's Bench, in the case of Hawker *v.* Hawker, and decided according to the principles established in Doe *v.* Simpson. [See Sugden on Powers, p. 105, 5th edition.]

Sects. 30 & 31.

3 B. & A. 537.

Much practical inconvenience followed upon this rule, from the uncertainty in whom the legal estate was vested; for this, depending upon the complete execution of the trusts of a will, necessarily became a matter of doubt after lapse of time and change of circumstances.

The 30th section declares that no devise to trustees or executors shall pass a chattel interest, unless a definite term of years, or an estate of freehold shall be thereby given to them expressly, or by implication. The 31st enacts, that where the trust may endure for an uncertain period, the trustee shall take the fee-simple, and not an

Sect. 30 & 31. estate determinable on the complete execution of the trust.

The effect of these clauses is, that the estate of a trustee or executor may be ascertained at the time of its creation: it may be immediately known to be either an estate in fee simple, or an estate for life, or for a term of years. They will not affect the question, whether executors take a fee-simple under a will, upon trust to sell, or are invested merely with a *power* of disposition; but those cases only where it is agreed that some estate passes to them. Nor will they affect the case where lands are devised to trustees, charged with the payment of debts, upon trust for a third person; for there the trustees do not take the legal estate at all.

For this question see Sugden on Powers, p. 106.

Kenrick *v.* Beauclerc, 3 Bos. & Pull. 175.

Sect. 32.

Estates Tail shall not lapse. 6 Cru. Dig. 140. Lord Langdale's speech in the House of Lords, Feb. 23, 1837.

It is a rule, that if the devisee dies before the devisor, the devise becomes void: a doctrine which probably derived from the rule of the Roman law—*pro non scriptis sunt iis relicta qui, vivo testatore, decedunt.* But when there is a gift in tail, the testator intends the issue to take, if no act be done to bar the entail; and if the person to whom the gift in tail is made should die in the life-time of the testator, leaving issue inheritable under the intended entail, it is probably the intention of the testator, that such issue should be substituted as the devisee in tail in lieu of the person first named. And this pro-

bable intention of the testator may be predicated with greater certainty, where the limitations are expressed, to one for *life*, and then to the heirs of his body, which constitutes a gift in tail to the first taker, according to the rule in Shelley's case, which is not understood by the generality of testators. Sect. 32. As in the case of Hodgson v. Ambrose, Doug. 337.

The present section gives effect to this probable intention of testators, against the established rule, that a devise in tail should lapse by the death of the devisee living the devisor.

Sect. 33.

The above rule, as to the lapsing of devises and bequests by the death of the devisee, living the devisor, works an obvious hardship, and against the probable wish of the testator, when legacies are given to his different children as their portions, and some of them marry and die in his lifetime, leaving children of their own. It is in the highest degree probable, that the testator does not intend the portions of such deceased children to lapse, by which the children of his deceased children will be left destitute. This clause, therefore, provides that gifts to children or other issue who are dead, leaving issue living at the testator's death, shall not lapse according to that rule. *Gifts to issue who die, leaving issue, shall not lapse.*

Sect. 34.

It is provided by this section "that this act *Operation of the Act.*

Sect. 34. shall extend to any will made before January 1, 1838, but that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived." It is observable upon this, that the re-execution or revival must be according to the forms prescribed by this act. The word *republication* seems to be surplusage, inasmuch as publication is no longer a necessary part of the solemnity of making a will.

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